

〈특집: 아시아 민주주의 발전에서 헌법재판의 역할〉

## Dual System of Control of Constitutionality of Acts in Japan\*

- On the Relation between Examination by the Legislative  
Bureaus and Judicial Review -

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### Abstract

In order to understand the reality of the constitutional review system, it would be necessary to analyze not merely the modalities of constitutional review by the judicial branch, but also the integrated government structure as a whole, while taking into account the function and practices of various prior check systems.

If the function of control of constitutionality is understood merely as ex-post review by the judicial court, it would lead to an impression that constitutional review is not always actively exercised in Japan and that the Supreme Court is not fully performing the function of constitutional review. However, regarding the Government bills which account for the majority of the bills submitted to the Diet, prior strict legal scrutiny on a bill by the Cabinet Legislation Bureau is required. Moreover, the Diet member's bills also receive a prior check by the Legislative Bureau of the House which is an assisting body.

Therefore, it would not be proper to criticize the practices of constitutional review by the Supreme Court as "judicial passivism" in the sense that it is not fully performing the function of constitutional review. Rather, it should be considered that there are few opportunities for invoking the ex-post review system effectively, because the prior constitutionality examination by the assisting bodies of the democratic institutions are effectively functioning.

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## I. Introduction

(1) The major aims of my report on today's theme are the following two points. First, I would like to examine the state of the Japanese judicial review system, and to further direct my attention to the function of the control of constitutionality in the democratic government structure as a whole as well as the issue of how such control should be secured.

Secondly, I would like to demonstrate that there is another view possible, besides the prevailing view of "judicial passivism," which is particularly given as criticism toward the practices of constitutional review by the Japanese Supreme Court, by directing my attention to the function of the control of constitutionality by the legislative bureaus which assist the Cabinet or Government and both Houses.

(2) The term "judicial passivism" is used in the critical sense of not actively exercising the power of constitutional review, mainly based on the fact that the Supreme Court has rarely rendered judgments declaring laws and ordinances unconstitutional. For the system to control constitutionality by means of trials, Japan follows an American model of constitutional review by the judicial branch, rather than a German model of control of constitutionality by constitutional justice. Therefore, it may seem that Japan has had fewer judgments rendering the acts unconstitutional compared to the United States.

However, it needs to be noted that there is a three-dimensional parallel review system particular to the federal system of the U.S., and that this is the reason for a large number of judgments rendering acts unconstitutional. That is, in the system collectively called judicial review, there are such three practices as (a) a review of state acts by the state courts, (b) a review of state acts by the federal courts, and (c) a review of acts of Congress by the federal courts.

Among these, the system comparable to that of Japan is (c), which governs the relationship between the legislative branch and judicial branch on an equal footing, and which relates to 66 cases of judgments rendering acts unconstitutional during

the approximately 50-year period after the “Constitutional Revolution” of 1937 (up to 1988). This number is fewer than the 71 cases of judgments rendered during the approximately 30-year period before the “Constitutional Revolution.” During the approximately 200-year period after the enforcement of the Constitution of the United States, there have been as few as 139 judgments declaring acts unconstitutional, which include many judgments based on the notorious “doctrine of substantive due process.” Therefore, we should abstain from judging the stance of the Supreme Court by a simple numerical comparison.

## II. Control of Constitutionality of Acts in the Democratic Government Structure

### 1. Function of Control of Constitutionality and Constitutional Review System

(1) Under a democratic government structure which guarantees freedom of speech and suffrage, the issue of constitutionality of an act is normally scrutinized from an early stage of the legislative process. Particularly, in the case of legislation relating to the people’s rights and duties, the bill is often reported by the mass media, etc. from the stage of initial draft, creating controversy from diverse perspectives as to the purposes and effects of the legislation and questions on the wording of the bill.

Considering such a situation, the issue of constitutionality of an act should be discussed not only at the stage of ex-post constitutional review by the judicial branch, but also from the drafting stage prior to the legislation. In this sense, a person or organization involved in the legislative process, more or less, inevitably faces the question of constitutionality, and consequently will be required to assume some function of control of constitutionality, depending on their respective degree of commitment to the legislative process.

In such case, the controlling body of the constitutionality varies with the constitutional regime. That is, under a presidential system in which only the

lawmakers are allowed to submit a bill, only the function of control of constitutionality by the Parliament has significance whereas, under a parliamentary cabinet system based on collaboration between the Cabinet and Parliament, these political branches share the functions and responsibilities for the control of constitutionality of legislation.

On the other hand, the function of control of constitutionality to be performed after the enactment and enforcement of an act has been generally institutionalized as the ex-post review system by the court. The categories and methodologies of this system will be discussed later (see 3).

(2) By focusing on the prior control of constitutionality by the political branches, apart from the ex-post review by the court, I do not intend to assert that these are equivalent even in terms of the levels of control, as the prior control of constitutionality by the political branches, even sometimes institutionalized (e.g. public hearing by Parliament), lacks both a stringent adversarial system and an argument process like those seen in the court trials.

Nevertheless, if the control of constitutionality by the political branches can be implemented by the organization independent of the body responsible for drafting bills, such control function could be considerably effective and concentrated.

## 2. Prior Control by the Political Branches

(1) Firstly, looking at the legislative process at Parliament, when a lawmaker submits a bill, the assisting body is expected to perform the control the constitutionality of the bill, as long as the its early enactment is sought. Also, for the bills submitted by the Cabinet, control of constitutionality is expected to be implemented in the course of deliberation at a committee or a plenary session of Parliament.

There are some options for such assisting body that can effectively perform such function of control of constitutionality, such as individual legislative advisors and the parliamentary secretariat capable of systematic responses. In Japan, the Legislative Bureaus of the Houses have been newly established under the existing

Constitution, and have played the role of a powerful tool for the Diet members' policy-making and bill-drafting.

(2) On the other hand, in the countries adopting a parliamentary cabinet system, many bills are submitted to Parliament by Cabinets, and many of them are enacted through deliberation by Parliament. In this case, as mentioned above, control of constitutionality will be performed in the course of the deliberation at a committee or a plenary session of Parliament. However, considering that, under the parliamentary cabinet system, the majority in Parliament forms and maintains a Cabinet, there is the possibility that effective control of constitutionality in the deliberation process cannot be expected.

Therefore, what would be more important is to secure opportunities for control of constitutionality in the process of drafting a bill, or, more specifically, to create a framework enabling the assisting body involved in the process to perform the effective function of control. While there are various options for such body, in Japan, this duty has been delegated to the Cabinet Legislation Bureau which has a long history.

### 3. Ex-post Review by the Court

(1) Today, in general, as means to effectively secure the supremacy of the Constitution, various systems to review constitutionality of the acts have been put in place. From the perspective of comparative laws, these constitutional review systems are not harmonized in line with the same framework. These systems can be classified into the following types, depending on the aspect of the system to be focused on.

- 1) When viewed from the aspect of the purposes of the review, the systems are roughly classified into the following two categories : (a) a continental European type, whose main purpose is to protect the Constitution, and (b) an American type, whose main purpose is to guarantee people's rights (the guarantee of private rights).
- 2) From the aspect of the methods of the review, the systems are often

classified into the following two categories : (a) a constitutional justice system and (b) a constitutional-law litigation system. “Constitutional justice” herein refers to a trial seeking determination based on the public authority by the special reviewing body generally called the “constitutional court” as to the constitutionality of the acts. For this type of trial, decisions as to the constitutionality of acts are shown in the main text of judgments. In contrast, “constitutional-law litigation” refers to litigation in which the judicial court, whose purpose is to adjudicate concrete litigation cases, renders judgments on the constitutionality of the applicable laws involved in adjudicating the case. For this type of trial, decisions as to whether the act is constitutional are presented in the *ratio decidendi*.

- 3) When viewed from the aspect of the timing of review, the system can be also classified into the following two categories : (a) prior review to be conducted before the enforcement of acts, and (b) ex-post review to be conducted after the enforcement of the acts. The representative example of the prior review system is the one adopted by the Constitutional Council of France. However, as is well known, France also has introduced the ex-post review system by the recent amendment to the Constitution.
- 4) From the aspect of the reviewing body, the systems can be contrasted as follows : (a) centralized-type, with the judicial supreme court or special constitutional court having the exclusive reviewing authority, and (b) a decentralized/distributed-type, with the lower courts and other courts also having the authority to determine the constitutionality.

(2) The categorization into concrete review and abstract review is often suggested based on the comparison between the American type and German type. However, even under the constitutional-law litigation system, constitutional review is occasionally made in the course of an objective lawsuit whereas, even under the abstract review system, most of the cases of objections of unconstitutionality have been triggered by a concrete dispute case.

Therefore, it must be said that such contrastive categorization is a considerably

misleading understanding of the systems. Even if the term “abstract review system” is to be used, it should be reserved for the traditional Constitutional Council of France, which has performed a constitutional review prior to the final enactment of an act.

### III. Dual System of Control of Constitutionality of Acts in Japan

#### 1. Government Bill and the Cabinet Legislation Bureau

(1) In the case of a Government bill, in general, the section (unit of administrative activities) of the ministries and agencies having jurisdiction over the area covered by the bill drafts the bill, after seeking the opinions and intentions of various sectors and studying domestic and foreign literature. Then, after the internal discussion within the ministry, the bill is referred to the conference of relevant ministries. Therefore, the function of control of constitutionality may be performed in the process of such ministerial or cross-ministerial discussions.

However, as the examination function at this stage is merely the internal administrative procedure, it cannot be understood to provide the function of control of constitutionality by the external body. The control function in this context can be expected to be performed by the Cabinet Legislation Bureau, which will be further discussed below.

First, regarding the position of the Cabinet Legislation Bureau, it should be noted that it is an assisting body subordinated to the Government, but is a highly independent professional organization supported by its unique staffing system and the authority established since the Meiji period.

The examination by the Cabinet Legislation Bureau is the procedure required under the law. The legal basis for this requirement is Article 3, paragraph (1) of the Act for Establishment of the Cabinet Legislation Bureau which reads as follows : “to examine the drafts of bills, cabinet orders and treaties to be referred to the Cabinet meeting, and to submit them to the Cabinet with the opinions and necessary revisions.”

Regarding the method of examination by the Cabinet Legislation Bureau, it is said to “examine if the bill stipulates so-called legal matters,” while particularly taking into consideration the following points : 1) that the bill is consistent with the court precedents, practices, major academic theories, etc., in addition to the current system of laws headed by the Constitution, 2) that the purpose of the bill is to realize the philosophy of the Constitution, such as respect of individuals and promotion of public welfare, 3) that the bill is reasonable and appropriate as the legal norm, i.e. that it is in line with the purpose of legislation, fair and effective, and is reasonably expected to be deferred to and complied with in the relevant area by the nationals.

(2) Here, the expressions “constitution” and “philosophy of the constitution” imply the control of constitutionality of the bill. The following remark made by a lawyer who was involved in the Diet member’s bill also infers the Cabinet Legislation Bureau’s function of control of constitutionality through the examination of bills.

There is no such organization as the Cabinet Legislation Bureau in the U.S., so a Congress member, on his/her initiative, can submit the bill relatively freely. The U.S. deserves to use the term “separation of powers,” as the powers are separated such that the Congress is dedicated to lawmaking and the court to the determination of constitutionality of the acts. Contrary to this, in Japan, the Cabinet Legislation Bureau which examines the Cabinet bills plays the role of a so-called secondary Supreme Court, and the bills are scrutinized based on the perfectionism in assuring the consistency with the system of laws headed by the Constitution.

A person who formerly worked for the Legislative Bureau of the House also has given a similar comment. According to this comment, firstly, an important point to be checked in the Cabinet Legislation Bureau’s examination is to secure logical consistency within the system of laws headed by the Constitution, that is, constitutionality examination of a bill. In addition, according to this comment, the government’s right of interpretation of the Constitution is virtually in the hands of the Cabinet Legislation Bureau, and its constitutionality examination which covers



all the Government bills are characterized by the following facts : 1) that it is implemented prior to drafting a bill, 2) that most of the bills submitted to the Diet comprise Government bills, and 3) that it is implemented in a considerably strict manner therefore, the Cabinet Legislation Bureau's function to secure constitutionality of a bill is much larger than that of the Supreme Court vested with the power of constitutional review.

The Cabinet Legislation Bureau examines about 500~600 affaires per year on average, including the drafts of Government bills and cabinet ordinances. In particular, the draft Government bill prepared by each ministry and agency undergoes strict examination, from the perspective of constitutionality such as the effect on people's rights and obligations or the consistency with the whole of legal systems. Given this, it would be a natural consequence that in Japan, the court would declare the Government-initiated Acts unconstitutional less frequently compared to the U.S. and other countries.

## 2. Diet member's Bills and Legislative Bureaus of the Houses

(1) Meanwhile, the legal basis for the Legislative Bureau of the House services relating to drafting and examination of acts is Article 131 of the Diet Act which reads as follows : "to assist Diet Members in drafting bills." It is controversial whether the Legislative Bureau of the House is required to provide the assistance in relation to the lawmaker-initiated bills. However, this issue will be discussed later (see (2) below).

Generally speaking, the points of attention for the examination of the contents in the process of the Legislative Bureau of the House's examination through the drafting of Diet member's bills are said to be as follows : (i) whether it is appropriate to stipulate such contents by the Act; (ii) whether it is feasible if it is stipulated by the Act; (iii) compliance with the constitution; (iv) consistency with the principle of respect of individual's personalities and welfare for the entire society; (v) whether the bill results in unjustified interference by the public authorities; and (vi) whether the bill runs counter to the existing related legal systems.

Thus, whenever the Legislative Bureau of the House codifies the legislative concept of the Diet Member, it checks whether the scheme of new legislation conceived by each Diet member would be compatible with the existing whole of legal orders and legal theories. In addition, it is said that the Legislative Bureau of the House in some cases makes recommendation to amend the proposal or withdraw the proposal itself, and that the most important perspective for such recommendation-making is whether the proposed legislative concept is constitutional (constitutionality examination). As a consequence, the Legislative Bureau of the House's function of control of constitutionality is inferred in this context.

(2) The issue involved here is the position of the Legislative Bureau of the House, as already mentioned above. Some authors say that the right to submit the bill is the most fundamental right of Diet members, and that the provisions and practices which would be obstacle sin exercising this right should be lifted. In other words, such authors say that the appropriateness of the contents of bill is the issue to be ultimately determined by the voters, not by the factions or institutions of the Houses, and that even supposing that the bill contradicts the Constitution, it would be appropriate to refer the issue to the ex-post review by the judicial branch.

On the other hand, other authors argue that the Legislative Bureau of the House has a function to check the proposed legislation from the perspective of legal theories, and also from the perspective of policy measures if necessary, instead of drafting the bill only from the perspective of legislative techniques. However, even such authors assert that the acts adopted by the Houses or Diet member's bill concept can only be restrained by a considerably high-level and independent state organization, and that the Legislative Bureau of the House by no means has the power to refuse the bill on the ground of its unconstitutionality.

As mentioned above, in theory, the Diet member's right to propose the bill is considered to supersede in relation to the Legislative Bureau's examination function; however, in practice, this is not always the case. According to some practitioners, in practice, the secretariats of both Houses would not accept any bill

prepared without legislative assistance of the Legislative Bureau of the House, although the law allows a Diet Member to propose (submit) a bill without such assistance.

### 3. Ex-post Review by the Judicial Branch

(1) Under the current Constitution of Japan, the jurisdiction of the state is unified, in the sense that the judicial power exclusively belongs to the court organizations headed by the Supreme Court. That is, under the existing Constitution, a diversified trial system consisting of judicial trial, administrative trial, constitutional justice, etc., which is generally adopted by the continental European countries, is not adopted in Japan.

The power of the judicial courts, in its nature, is to adjudicate legal disputes. At the same time, the current Constitution adopts a system in which the judicial court, if the case involves the issue of constitutionality of the applicable legislative act (i.e. law), also determines such issue. Such system of review of unconstitutional legislation by the judicial branch was established in the U.S., and is called “judicial review.” Article 81 of the Constitution of Japan clearly indicates that it adopts a system of constitutional review, stipulating as follows : “The Supreme Court is the court of last resort with power to determine the constitutionality of any act, order, regulation or official act.”

(2) However, there has been a controversy between the two theories as to the interpretation of the nature of this provision. The contrasts between these two theories largely correspond to the two types of review system, i.e. constitutional justice and constitutional-law litigation, as explained thus far. The first theory interprets that under the Constitution, it is possible, depending on the content of the legislative measures, to give the Supreme Court a function of the constitutional court as seen in the continental European laws, and that independent constitutional review is possible; whereas the second theory interprets that, taking into account the process of adoption of the Constitution effected by the U.S. Constitution, the Supreme Court was envisioned as the “court of last resort” of the judicial court

which adjudicates legal disputes, and that only collateral constitutional review is possible under the Constitution.

In this regard, the Supreme Court earlier showed the understanding that Article 81 of the Constitution of Japan is “the express stipulation of the power of constitutional review established as the interpretation of the U.S. Constitution” (Judgment of the full bench on July 8, 1948). Further, the Supreme Court, in the later Police Reserve Force Case, held that the court “cannot exercise the power of making abstract judgment on the controversies or disputes which may arise from the interpretation of the Constitution or other acts and orders, without the concrete legal action having been instituted.” (Judgment of the full bench on October 8, 1952). Thus, the Supreme Court has made it clear that the constitutional review system should be implemented as the collateral review system (constitutional-law litigation), that is, a judicial review of American type.

(3) When discussing such constitutional review system in Japan, the issue of substantive criteria for constitutional review which indicate the level of control of constitutionality and the issue of procedural control are discussed in considerable depth, in addition to the issues of the operational framework for judicial review such as the doctrine of necessity, rule of avoidance of constitutional issues, rule of avoidance of judgment of unconstitutionality (rule of constitutional interpretation), legislative fact, and review of purposes and means.

However, this report only points out the following characteristics, for reason of lack of sufficient time to discuss these issues. Firstly, it should be noted that the lower courts (district court, high court, etc.), which generally examines litigation cases, also can perform constitutional review. That is, Article 81 of the Constitution of Japan is interpreted to grant the power to determine constitutionality to the lower courts as well, because the Supreme Court stands as the top of the hierarchy of the judicial court system based on the tiered trial system. Therefore, in relation to the aforementioned types of “ex-post review by the court” (see II 3), the constitutional review system of Japan could be classified as the “decentralized/distributed-type constitutional review.”

Secondly, the ultimate review of the constitutionality is conducted by the Supreme Court which is the final appellate court, and there are some institutional frameworks as follows, in relation to the modalities of trial by the Supreme Court.

- (i) In principle, it is up to the discretion of the Supreme Court to decide whether the case should be adjudicated by the full bench or petty bench however, if any of the following applies, the case must be adjudicated by the full bench : (a) a judgment on a question of Constitution is to be made for the first time, (b) a judgment of violation of Constitution is to be made, or (c) the case law is to be changed (Article 10 of the Court Act).
- (ii) In addition, the Supreme Court, based on its rule-making power to adopt the judicial procedures (Article 77 of the Constitution), provides that the case shall be examined by the full bench if any of the following applies: (d) when the opinions of the petty bench are divided into two of the same number of opinions, or (e) the presiding judge of the petty bench determines the adjudication by the full bench to be appropriate (Article 9, paragraph (2) of the Supreme Court Business Handling Procedures).
- (iii) When the case is to be examined by the full bench, the full bench may also limit its examination and adjudication on a particular question, especially the question of constitutionality. The examination of the case by the petty bench is conducted based on this premise. (Article 9, paragraphs (3) and (4) of the Supreme Court Business Handling Procedures). In reality, there have been many cases in which the point at issue was referred to and examined by the grand bench. In both cases, important judgments have been made.

#### 4. Practices of Judicial Review

(1) During the approximately 64-year's period to date since the enforcement of the Constitution of Japan, there have not been so many cases where the statutory provision at issue was judged unconstitutional. There have been only eight cases in which the grand bench of the Supreme Court made such judgments, which are

described below.

- 1) The judgment dated on April 4, 1973, which judged that Article 200 of the Criminal Code stipulating a heavier punishment for a parricide murder was against the principle of equality under Article 14 of the Constitution (Parricide Murder Case).
- 2) The judgment dated on April 30, 1975, which judged that Article 6, paragraphs (2) and (4) of the Pharmaceutical Affairs Act stipulating the restriction on locations for the licensing standards for the establishment of pharmacies infringed the freedom to choose occupation stipulated in Article 22 of the Constitution (Pharmaceutical Affairs Act Case).
- 3) The judgment dated April 14, 1976, which judged that Schedule No. 1 of the Public Offices Election Act stipulating the assignment of number of seats of members of the House of Representatives under a so-called medium constituency system (the number of seats was 491), was against the principle of equal election in Article 14 of the Constitution (House of Representatives Seats Case).
- 4) The judgment dated July 17, 1985, which judged that Schedule No. 1 of the Public Offices Election Act, stipulating the assignment of seats of members of the House of Representatives under a medium constituency system (the number of seats was 511), was against the principle of equality (House of Representatives Seats Case).
- 5) The judgment dated April 22, 1987, which judged that Article 186 of the Forest Act not allowing the division of a shared forest was against the guarantee of property rights under Article 29 of the Constitution (Forest Act Case).
- 6) The judgment dated September 11, 2002, which judged that the provisions of Articles 68 and 73 of the Postal Act limiting the scope of compensation for damages relating to certain postal items violated Article 17 of the Constitution which guarantees the right of claim for state compensation (Postal Act Case).
- 7) The judgment dated September 14, 2005, which judged that Paragraph 8 of the Supplementary Provision of the Public Offices Election Act, which had

limited the right to vote of expatriate Japanese nationals in elections of proportional representatives for both Houses, was against universal suffrage which guarantees an opportunity to vote (Expatriate Voting Rights Suit).

- 8) The judgment dated June 4, 2008, which judged that the requirements for legitimation stipulated in Article 3, Paragraph (1) of the Nationality Act was against the principle of equality under Article 14 of the Constitution, in that an irrational distinction was established between a legitimate and illegitimate child (Nationality Act Case).

For most of the provisions judged unconstitutional by the Supreme Court, after the administrative circular notices ordering the suspension of the enforcement of such act are issued, the legislative branch responds by adopting the draft revised act submitted by the Cabinet to effect deletion or amendment of the relevant provision. From the standpoint that the judicial branch, as a body in charge of state governing process along with the legislative and administrative branches, plays a role in policy making, namely, formation of the constitutional order, through their mutual relationship and interactions, such response is evidence of a desirable corresponding relationship between the political branch and judicial branch.

On the other hand, in the case of the schedule of the Public Offices Election Act, the political impact was massive, because the provision to be amended involved a change in the number of seats of Houses. Moreover, while the Supreme Court judged the national election executed based on such number of seats to be illegal, it also directed that the validity of the election should be maintained, based on the special consideration by way of the application of the “general principles of law.” Thus, this case mirrors the difficulty of the judicial court’s intervention in the political process.

(2) Besides the above eight cases, there are four cases in which the provisions of the Public Offices Election Act relating to the apportionment of House members were judged to be in an “unconstitutional state.” It is true that the Supreme Court has rarely judged acts unconstitutional, even adding such four

cases. Regarding this point, there has been the criticism as stated in the beginning that the Supreme Court resorts to “judicial passivism” and refrains from actively exercising its power of constitutional review.

However, I would consider such evaluation to be inappropriate, and that proper analysis of this situation calls for comprehensive assessment in the context of the entire democratic government structure surrounding the power of constitutional review by the Supreme Court (Here, the two judgment cases rendering the actions of local government unconstitutional, and some Supreme Court judgments rendering the municipal ordinances constitutional based on limited interpretation are not taken into account.).

First, as explained in detail above, it is also necessary to consider the significance and function of the prior control of constitutionality by the Legislative Bureau of the House and the Cabinet Legislation Bureau. Therefore, it is not proper to evaluate the stance of the Supreme Court, focusing only on the number of judgments rendering the acts unconstitutional as a result.

Second, even when viewed from the aspect of the number of cases, it should be firstly noted that, in addition to the abovementioned four cases relating to the apportionment of House members where the Court judged the provision to be in an “unconstitutional state,” there are also many grand bench judgments which maintained the validity of provisions of an act with certain conditions and qualifications, i.e. by way of a limited interpretation of the meaning of the articles of act in issue in accordance with the so-called principles of constitution-conformable interpretation (in German, *Verfassungskonforme Auslegung*), although the Court did not hold the relevant provisions to be unconstitutional. (For example, Bona Fide Third Party Property Confiscation Case (judgment dated November 27, 1957), Third Party Property Confiscation Case (judgment dated November 28, 1962), and Tokyo Teachers’ Union Case (judgment dated April 2, 1969)).

Moreover, even in such cases, new legislative measures in keeping with the purports of the judgment have often been taken. For example, the “Act on Emergency Measures on Criminal Procedure to Confiscate Items Owned by Third Parties” was enacted half a year later after the judgment of the Third Party



Property Confiscation Case. This indicates the desirable corresponding relationship between the political branch and judicial branch as mentioned earlier.

#### IV. Conclusion or Summary

(1) Firstly, the afore-mentioned points will be summarized as follows. If the function of control of constitutionality is understood merely as ex-post review by the judicial court, it would lead to an impression that constitutional review is not always actively exercised in Japan and that the Supreme Court is not fully performing the function of constitutional review.

However, regarding the Government bills which account for the majority of the bills submitted to the Diet, prior strict legal scrutiny on a bill by the Cabinet Legislation Bureau is required. Moreover, the Diet member's bills also receive a prior check by the Legislative Bureau of the House which is an assisting body. This is the reason why I entitled my report "Dual System of Control of Constitutionality."

Therefore, it would not be proper to criticize the practices of constitutional review by the Supreme Court as "judicial passivism" in the sense that it is not fully performing the function of constitutional review. Rather, it should be considered that there are few opportunities for invoking the ex-post review system effectively, because the prior constitutionality examination by the assisting bodies of the democratic institutions are effectively functioning.

Thus, in order to understand the reality of the constitutional review system, it would be necessary to analyze not merely the modalities of constitutional review by the judicial branch, but also the integrated government structure as a whole, while taking into account the function and practices of various prior check systems.

Furthermore, from the perspective of protection of rights of people in particular, it would be necessary, as a matter of course, to secure an ex-post remedy against the infringement of rights and interests of people. Rather, it should also be noted that an enhanced effective prior check would be the stronger tool for the effective protection of people's rights and interests.

(2) Given the necessity and significance of analysis of the function of control of constitutionality in the context of the entire government structure, we will face other issues, including the issues as to whether the constitutional democracies of Asian and western European countries also have systems of prior control of constitutionality by the assisting body of Parliament or the Government, which are equivalent to the Legislative Bureau of the House or Cabinet Legislation Bureau of Japan, and if so, the issue of how effectively such systems are functioning.

In this context, I have been paying attention to the function of the Ministry of Government Legislation of South Korea, which is subordinated to the Prime Minister and has over 200 staff members. This ministry reportedly checks the drafts of ministerial orders which is equivalent to the Japanese ministerial ordinances, in addition to the drafts of government bills, treaties and the Prime Minister's order to be submitted to the Cabinet, as well as the power of administrative trial.

My interest here is, of course, the issue of whether such ministry is effectively performing the function of control of constitutionality as discussed in this report. I would like to conclude my report, expecting to acquire insight on this question on this opportunity.

■ **Statutory Provisions on Judicial Review of Japan** [Extract]

**CONSTITUTION OF JAPAN**

Chapter VI. Judiciary

**Article 76.** (1) The whole judicial power is vested in a Supreme Court and in such inferior courts as are established by law.

(3) All judges shall be independent in the exercise of their conscience and shall be bound only by this Constitution and the laws.

**Article 77.** (1) The Supreme Court is vested with the rule-making power under which it determines the rules of procedure and of practice, and of matters relating to attorneys, the internal discipline of the courts and the administration of judicial affairs.

**Article 81.** The Supreme Court is the court of last resort with power to determine the constitutionality of any law, order, regulation or official act.

**Article 98.** (1) This Constitution shall be the supreme law of the nation and no law, ordinance, imperial rescript or other act of government, or part thereof, contrary to the provisions hereof, shall have legal force or validity.

**DIET LAW**

Chapter XVII. National Diet  
Library, Legislative Bureau,  
Secretaries to Members and  
Members' Office Buildings

**Article 131.** (1) A Legislative Bureau shall be established in each House to assist Diet Members in drafting bills.

(2) Each Legislative Bureau shall have one Commissioner General, secretaries and other necessary personnel.

(3) The Commissioner General of the Legislative Bureau shall be appointed and dismissed by the presiding officer with the approval of the House, provided that, when the Diet is out of session, the presiding officer may accept the resignation of the Commissioner General of the Bureau.

(4) The Commissioner General of the Legislative Bureau shall administer of the business of the Legislative Bureau under the supervision of the presiding officer.

(5) The secretaries and other personnel of the Legislative Bureau shall be appointed and dismissed by the Commissioner General, with the

consent of the presiding officer and the approval of the Committee on Rules and Administration.

(6) The secretaries of the Legislative Bureau shall work under the direction of the Commissioner General.

### COURT ACT

**Article 3.** (1) Courts shall, except as specifically provided for in the Constitution of Japan, decide all legal disputes, and have such other powers as are specifically provided for by law.

**Article 5.** (1) The justices of the Supreme Court shall comprise the chief justice, who is called the Chief Justice of the Supreme Court, and other justices, who are called Justices of the Supreme Court.

(3) The number of Justices of the Supreme Court shall be fourteen and the number of judges of lower courts shall be determined by law separately.

**Article 10.** Regulations of the Supreme Court shall determine which cases are to be handled by full bench and which by petty bench; provided, however, that in the following instances, a petty bench may not give a judicial decision

(i) Cases in which a determination is to be made on the constitutionality of law, order, rule, or disposition, based on the argument by a party (except the cases where the opinion is the same as that of the judicial decision previously rendered through the full bench in which the constitutionality of act, order, rule, or disposition is recognized).

(ii) Cases other than those referred to in the preceding item when any law, order, rule, or disposition is to be decided as unconstitutional.

(iii) Cases where an opinion concerning interpretation and application of the Constitution or of any other laws and regulations is contrary to that of a judicial decision previously rendered by the Supreme Court.

### ACT FOR ESTABLISHMENT OF CABINET LEGISLATION BUREAU

**Article 1.** (Establishment) The Cabinet Legislation Bureau shall be established within in the Cabinet.

**Article 3.** (Affairs under Jurisdiction) The Cabinet Legislation Bureau shall administer the following affairs:

(i) To examine the drafts of bills, cabinet orders and treaties to be

referred to the Cabinet meeting, and to submit them to the Cabinet with opinions and the necessary revisions.

(ii) To prepare drafts of bills and cabinet orders, and to submit them to the Cabinet.

(iii) To provide opinions on legal issues

to the Cabinet, Prime Minister and the Ministers.

(iv) To conduct research and studies on domestic, foreign and international legislations and their operations.

(v) Other affairs relating to the legislations in general.